HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No.4829 of 2007

Between:

Mandala Vidyasagar Reddy

... Petitioner

And

Motkuri Sarojana and others

... Respondents

:: ORDER::

Counsel for the petitioner: Smt.S. Nanda

Counsel for respondent No.1: Shri D.V. Madhusudhan Rao

August 22, 2007

Per G.S. Singhvi, CJ

This petition is directed against order dated 5.3.2007 passed by the Chairman, Election Tribunal-cum-Junior Civil Judge, Parkal in

I.A.No.174 of 2006 (O.P.No.3 of 2006) for recount of the votes polled in the election held on 29.7.2006 for the post of Sarpanch of Gorlaveedu Vilalge, Bhupalapally Mandal, Warangal District.

It is borne out from the record that the petitioner was declared elected as Sarpanch on 29.7.2006 because he secured 1212 votes as against 1135 votes secured by respondent No.1. The latter challenged the result of election under Section 233 of the Andhra Pradesh Panchayat Raj Act, 1994 (for short, 'the Act'). She alleged that even though the Election Officer was informed about inclusion of the names of 30 persons, who had died prior to preparation and publication of voters' list and requested him to delete the names of those persons, the latter did not do the needful; that total number of voters in the village is 2819, but the Election Commission published voters' list comprising 2847 names including the names of 30 dead persons; that respondent No.1, in collusion with other respondents, manipulated casting of votes in the name of 30 dead persons; that the Election Officer counted the votes on 29.7.2006 and rejected 82 votes; that her request for allowing her agents to remain present at the time of counting was not accepted by the Election Officer and being an illiterate lady, she could not keep vigil on the counting of votes; that she had represented to the district authorities, the Election Officer and also the State Election Commission against the manipulations made by respondent No.1 (the petitioner herein), but no action was taken to remedy her grievance.

In the counter filed by him, the writ petitioner denied the allegation of having manipulated casting of votes in the name of dead persons. He averred that 12 polling booths were established for the election of Sarpanch and Ward Members and for each booth the candidates had nominated agents; that at no point of time the election petitioner objected to the casting of votes by any individual; that he got 1212 votes out of 2347 valid votes and the election petitioner's grievance was totally misplaced.

During the pendency of the election petition, respondent No.1 filed an application for recount of votes by reiterating the allegations contained in the main petition. The same was registered as I.A.No.174 of 2006. The petitioner filed counter dated 30th October, 2006 and opposed the prayer of the election petitioner.

The Presiding Officer of the Tribunal briefly adverted to the pleadings of the parties and arguments of their advocates on the issue of the alleged violation of Rule 34 of the Andhra Pradesh Panchayat Raj (Conduct of Election) Rules, 1994 (for short, 'the 1994 Rules') and ordered recount of votes by making the following observations:

> "So far as the Rules are concerned, it is clear that the election officer has to follow the mandate under R.34(4) of the Rules. It is just and equitable that if he does not follow that rule, contesting candidates shall not be made to suffer. I agree with the learned counsel of the R1 that there is no presumption that the officials either followed the rules, or failed to follow the same, as such no inference could be drawn at this stage on that aspect, though it is on record that RW3 admitted that he did not follow R.34(4) of Rules by making endorsement with reason on the back of every rejected ballot paper. Since no individual shall suffer if the election officer does not follow the mandate under R.34(4) of the Rules, and at this stage, no definite conclusion can be arrived on the following or non-following of the procedure, it has become imperative for this tribunal to verify whether such a procedure is followed or not and in case of not following of such procedure what consequences shall follow. All the other contentions raised by the learned counsel for the first respondent as well as the petitioner touching the merits of the case have to be decided only in the light of the finding after verification of ballot papers on the aspect of the procedure under R.34. For this purpose of verification of procedure under R.34 of the Rules, the ballot papers have to be verified and recounted. I arrive at this tentative conclusion while reserving the finding on other aspects to be decided in the main O.P. Since the petition u/o 39 are supplementary proceedings, the outcome of the result of such proceedings will only subserve the main cause."

The writ petitioner has questioned the order of the Tribunal on the following grounds:

i) the Tribunal did not have the jurisdiction to entertain the interlocutory application and direct recount of votes because in the main petition respondent No.1 did not make such prayer;

ii) that bald allegations contained in the election petition did not warrant an order for recount, and

iii) that even if the Tribunal felt that Rule 34(4) of the 1994 Rules has been violated, it could not have ordered recount of all the votes.

Smt. S. Nanda relied on the judgment of the Supreme Court in **Vadivelu v. Sundaram**[1] and argued that the impugned order is liable to be set aside because the election petition and miscellaneous petition filed by respondent No.1 did not disclose any valid ground for recount of votes. Learned counsel emphasised that the burden to establish that there was substantial ground for ordering recount was on respondent No.1, which she failed to discharge and, therefore, there was no justification for ordering recount.

Sri D.V. Madhusudan Rao supported the order under challenge and argued that the direction given by the Tribunal does not call for interference under Article 226 of the Constitution because the entire election process was tainted by material irregularities. Learned counsel emphasised that names of as many as 30 persons, who had died much before preparation and publication of the electoral rolls, were included in the voters' list and the writ petitioner succeeded in manipulating casting of votes in the names of those persons. He further argued that even though respondent No.1 had protested against the methodology adopted by the Election Officer for counting the votes and had also lodged objection before declaration of the result, the latter did not entertain the same. He also relied on the judgment of the Supreme Court in **Gursewak Singh v. Avtar**

Singh[2] and **Sadhu Singh v. Darshan Singh and another**[3] and argued that the order for recount does not call for interference under Article 226 of the Constitution because respondent No.1 had been able to make out a substantial case for recount.

We have given serious thought to the respective arguments. In **M. Chinnasamy v. K.C. Palanisamy**[4], a three Judges Bench of the Supreme Court reviewed several judicial precedents on the subject and laid down the following propositions:

> "1) In relation to an election petition, the provisions of the Code of Civil Procedure apply. In terms of Order 6 Rule 2 CPC which is in pari materia with Section 83(1)(a) of the RP Act an election petition must contain concise statement of material facts. Full particulars are required to be set forth in terms of Section 83(1)(b) of the Act which relates to corrupt practice. Although a distinction exists in terms of clauses (a) and (b) of Section 83(1) of the Act, but pleading of material fact would include disclosure of all such information which if not rebutted would result in allowing the petition. A distinction between "particulars" and "full particulars" should also be borne in mind. The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case.
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> 2) The petition for setting aside an election must contain an adequate statement of the material facts on which the petitioner relies in support of his case. The requirement of the rule of pleadings containing material facts is salutary in nature.
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> 3) The parties are bound by the said rule of pleadings and verification thereof having regard to the fact that an election may not be set aside on hypertechnical grounds although no factual foundation therefor had been laid in the pleadings as the elected candidate may not have any hand therein. So far as requirement of pleadings in a case where a direction of re-counting of ballot papers has been prayed for, the court must proceed cautiously and with circumspection, having regard to the requirement of maintaining secrecy of ballot papers.
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> 4) Inspection of ballot papers can be ordered when in the facts and circumstances obtaining in the case, the Tribunal finds it necessary to so direct in the interest of justice. Discovery and inspection of documents with which the civil court is invested with power under the Code of Civil Procedure when trying a suit may be applied but such an order would not be granted as a matter of

course having regard to the insistence upon the secrecy of the ballot papers.

5) An order of re-counting of votes can be passed when the following ingredients are satisfied: (1) if there is a prima facie case; (2) material facts therefor are pleaded; (3) the court shall not direct re-counting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.

6) The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of re-counting of votes must be of a very high standard and is required to be discharged. When the pleadings do not contain the material facts and necessary particulars, any amount of evidence would be insufficient.

7) Only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.

8) A prima facie case has been made out for issuing a direction for re-counting. It is well settled that prima facie case must be made out for scrutiny and re-counting of ballot papers where it is of the opinion that the errors are of such magnitude as to materially affect the election. The Court or Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of ballot papers is necessary. Even if on re-count it was found that the returned candidate had not secured majority of the votes, the result could not have been disturbed unless prima facie case of high degree of probability existed for re-count of votes."

In **Chandrika Prasad Yadav v. State of Bihar**[5], the Supreme Court reiterated the proposition of law in the following words:

"It is well settled that an order of re-counting of votes can be passed when the following conditions are fulfilled:

(i) a prima facie case;

(ii) pleading of material facts stating irregularities in counting of votes;

(iii) a roving and fishing inquiry shall not be made while directing re-counting of votes; and

(iv) an objection to the said effect has been taken recourse to.

The requirement of maintaining the secrecy of ballot papers must also be kept in view before a re-counting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for re-counting."

If the pleadings of O.P.No.3 of 2006 are scrutinised in the backdrop of the above stated legal position, it becomes clear that respondent No.1 miserably failed to make out a case for recount of votes and the Tribunal committed a jurisdictional error by entertaining the prayer made in the interlocutory application. The main allegations made in the election petition filed by respondent No.1 are that the names of 30 persons, who had died prior to preparation and publication of electoral rolls, were included in the voters' list and the writ petitioner manipulated casting of their votes and that while rejecting 82 votes, the Election Officer did not comply with the provisions of Rule 34(4) of the 1994 Rules. These bald allegations did not constitute a valid ground for ordering recount of votes and the learned Presiding Officer of the Tribunal committed a grave error by entertaining the same.

The reason assigned by the Tribunal for ordering recount is too flimsy to be approved. The learned Presiding Officer noted the allegations contained in the election petition and the statement made by the Election Officer that he did not follow Rule 34(4) by making endorsement on the back of every rejected ballot paper and proceeded to observe:

"Since no individual shall suffer if the Election Officer does not follow the mandate under Rule 34(4) of the Rules and, at this stage, no definite conclusion can be arrived on the following or non-following of the procedure, it has become imperative for this Tribunal

to verify whether such a procedure is followed or not and in case of not following such procedure what consequences shall follow. All the other contentions raised by the learned counsel for the first respondent as well as the petitioner touching the merits of the case have to be decided only in the light of the finding that verification of the ballot papers and the aspect of procedure under Rule 34(4) of the Rules have to be verified and recounted. I arrive at this tentative conclusion the finding on the other aspects to be decided in the main O.P."

In our considered view, the entire approach adopted by the Tribunal is lopsided and by ordering recount the learned Presiding Officer has done nothing more than to indulge in fishing in a roving enquiry and thereby violated the secrecy of the ballot.

In the result, the writ petition is allowed. Order dated 5.3.2007 passed by the Tribunal in I.A.No.174 of 2006 (O.P.No.3 of 2006) is quashed. However, it is made clear that this order shall not affect final adjudication of O.P.No.3 of 2006, which the Tribunal is expected to decide at the earliest in view of order dated 13.10.2006 passed by the learned Single Judge in Writ Petition No.21293 of 2006 – Motkuri Sarojana v. Mandala Vidyasagar Reddy and others.

As a sequel to disposal of the writ petition in the manner indicated above, WPMP.No.6184 of 2007 filed by the petitioner for interim relief and WVMP.No.735 of 2007 filed by respondent No.1 for vacating the interim order are disposed of as infructuous.

G.S. SINGHVI, CJ

August 22, 2007

C.V. NAGARJUNA REDDY, J

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[1] (2000) 8 SCC 355

[2] (2006) 4 SCC 542

[3] (2006) 5 ALD 12 (SC)

[4] (2004) 6 SCC 341

[5] (2004) 6 SCC 331